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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 SEAN G. F.,

10 Plaintiff,

11 v.

12 COMMISSIONER OF SOCIAL
SECURITY,

13 Defendant.

CASE NO. 3:19-CV-5336-DWC

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

14 Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of
15 Defendant's denial of Plaintiff's application for supplemental security income ("SSI"). Pursuant
16 to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties
17 have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 2.

18 After considering the record, the Court concludes the Administrative Law Judge ("ALJ")
19 erred when she improperly considered the opinions of Dr. Erum Khaleeq, Mr. Michael March,
20 Ms. Neesha Davies, and Dr. Sandra Landrum. The ALJ's error is therefore harmful, and this
21 matter is reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the
22 Commissioner of the Social Security Administration ("Commissioner") for further proceedings
23 consistent with this Order.
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In the Opening Brief, Plaintiff maintains the ALJ erred by improperly: (1) evaluating the opinions of Dr. Khaleeq, Mr. March, Ms. Davies, and Dr. Landrum; (2) evaluating Plaintiff's subjective symptom testimony; and (3) determining Plaintiff's residual functional capacity ("RFC"). Dkt. 15. Plaintiff requests the Court remand his claims for an award of benefits. Dkt. 15, pp. 10-11.

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

I. Whether the ALJ properly considered the medical opinion evidence.

ORDER REVERSING AND REMANDING
DEFENDANT'S DECISION TO DENY
BENEFITS - 2

1 In assessing an acceptable medical source, an ALJ must provide “clear and convincing”
2 reasons for rejecting the uncontradicted opinion of either a treating or examining physician.
3 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506
4 (9th Cir. 1990)); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988). When a treating or
5 examining physician’s opinion is contradicted, the opinion can be rejected “for specific and
6 legitimate reasons that are supported by substantial evidence in the record.” *Lester*, 81 F.3d at
7 830-831 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*,
8 722 F.2d 499, 502 (9th Cir. 1983). The ALJ can accomplish this by “setting out a detailed and
9 thorough summary of the facts and conflicting clinical evidence, stating his interpretation
10 thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing
11 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)). “Other medical source” testimony
12 “is competent evidence that an ALJ must take into account,” unless the ALJ “expressly
13 determines to disregard such testimony and gives reasons germane to each witness for doing
14 so.” *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001); *Turner v. Comm’r of Soc. Sec.*, 613
15 F.3d 1217, 1224 (9th Cir. 2010). “Further, the reasons ‘germane to each witness’ must be
16 specific.” *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009).

17 A. Dr. Kahleeq

18 Psychiatrist Dr. Kahleeq examined Plaintiff in June 2015. AR 395-398. Dr. Kahleeq
19 conducted a clinical interview and a mental status examination (“MSE”) of Plaintiff. AR 395-
20 398. She diagnosed Plaintiff with depression. AR 398. Dr. Kahleeq opined Plaintiff’s stream of
21 mental activity/speech was “somewhat slow at times because of pain.” AR 397. Dr. Kahleeq said
22 that Plaintiff’s “prognosis is guarded ... regarding his pain, which was causing him some distress
23 and mood irritability. He was trying to laugh and smile, but he was sarcastic at the same time.”
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1 AR 398. Dr. Khaleeq opined that although Plaintiff claimed to have problems with his memory,
2 Plaintiff “did fairly well on the Mental Status Examination...” AR 398. Dr. Khaleeq opined
3 Plaintiff’s sarcasm “could get him into trouble” when accepting instructions from supervisors.
4 AR 398. She opined Plaintiff would have difficulty performing work activities after seeing him
5 take “at least five minutes to get off of the chair.” AR 398. She opined Plaintiff may have
6 difficulty maintaining regular attendance due to his pain, which causes him to be irritable and
7 sarcastic. AR 398. Lastly, Dr. Khaleeq opined “[t]he usual stress encountered in the workplace
8 could further aggravate his psychiatric condition.” AR 398.

9 The ALJ discussed Dr. Khaleeq’s opinion and gave it limited weight, because:

10 (1) His [sic] opinion that the claimant may have difficulty performing work
11 activities, maintaining regular attendance, and dealing with work stress appear to
12 be based on the claimant’s subjective allegations of chronic pain symptoms. (2) Dr.
13 Khaleeq did not examine or treat the claimant’s physical impairments, and as an
14 examining psychiatrist, he [sic] has a limited basis for giving an opinion on how
the claimant’s physical impairments would interfere with work activities. (3) His
[sic] opinion is inconsistent with the evidence of the positive response to pain
management and with the objective evidence of the claimant’s physical
impairments, particularly the evidence of the claimant’s spinal disorders.

15 AR 24 (numbering added).

16 First, the ALJ rejected the portion of Dr. Khaleeq’s opinion regarding Plaintiff’s ability to
17 perform work activities, maintain regular attendance, and deal with work stress because it is
18 based on Plaintiff’s subjective testimony. AR 24. An ALJ does not provide clear and convincing
19 reasons for rejecting an examining physician’s opinion by questioning the credibility of the
20 patient’s complaints where the doctor does not discredit those complaints and supports his
21 ultimate opinion with his own observations. *Edlund v. Massanari*, 253 F.3d 1152, 1159 (9th
22 Cir. 2001). But if a doctor’s opinion is based “to a large extent” on an applicant’s self-reports
23 and not on clinical evidence, and the ALJ finds the applicant not credible, the ALJ may
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1 discount the doctor's opinion. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008).
2 Notably, a psychiatrist's clinical interview and mental status evaluation are "objective measures"
3 which "cannot be discounted as a self-report." *See Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th
4 Cir. 2017).

5 In *Buck*, the Ninth Circuit noted "[p]sychiatric evaluations may appear subjective,
6 especially compared to evaluation in other medical fields." *Id.* "Diagnoses will always depend in
7 part on the patient's self-report, as well as on the clinician's observations of the patient. But such
8 is the nature of psychiatry. Thus, the rule allowing an ALJ to reject opinions based on self-
9 reports does not apply in the same manner to opinions regarding mental illness." *Id.* (internal
10 citations omitted).

11 Here, Dr. Khaleeq based her opinion regarding Plaintiff's ability to perform work
12 activities, maintain regular attendance, and deal with work stress on more than just Plaintiff's
13 subjective testimony. Dr. Khaleeq opined Plaintiff would have difficulty performing work
14 activities after observing Plaintiff struggling to "get off of the chair" for "at least five minutes"
15 during the examination. *See* AR 397-398. Dr. Khaleeq opined Plaintiff may have difficulty
16 maintaining regular attendance "for the same reason." AR 398. She opined Plaintiff's pain "is
17 causing some mood irritability and sarcasm" and that Plaintiff's psychiatric condition could be
18 aggravated by the usual stress encountered in the workplace. AR 398. Dr. Khaleeq did not
19 discredit Plaintiff's subjective reports, and supported her ultimate opinion with objective testing,
20 personal observations, a clinical interview, and an MSE. *See* AR 395-398. Thus, Dr. Khaleeq
21 based her opinion on more than just Plaintiff's subjective reports. Additionally, Plaintiff has
22 failed to show that Dr. Khaleeq's opinion was more heavily based on Plaintiff's subjective
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1 | complaints and self-reports. Accordingly, this is not a specific and legitimate reason supported
2 | by substantial evidence for giving partial weight to Dr. Khaleeq's opinion.

3 | Second, the ALJ discounted Dr. Khaleeq's opinion because he did not examine or treat
4 | the Plaintiff's physical impairments, and as a psychiatrist, "he [sic] has a limited basis for giving
5 | an opinion on how the claimant's physical impairments would interfere with work activities."

6 | AR 24. First, Dr. Khaleeq did examine Plaintiff's physical impairments. *See* AR 397-398. For
7 | example, she observed Plaintiff in pain when trying to stand from his chair. *See* AR 397-398.

8 | Second, Dr. Khaleeq is a medical doctor, having obtained her doctoral medical degree. *See* AR
9 | 398. "Although a medical doctor's area of specialty is relevant, a physician with a doctoral
10 | medical degree (M.D.) is qualified to assess a claimant's physical functional limitations."

11 | *Fischer v. Colvin*, 2013 WL 5437571, *9 (W.D. Wash. Sept. 27, 2013). As Dr. Khaleeq
12 | underwent medical school training to obtain her M.D., further training in the specialty of
13 | psychiatry does not deprive her of the capabilities she had as an M.D. prior to her specialized
14 | training. *See id.* As Dr. Khaleeq was qualified to assess Plaintiff's physical functioning, the
15 | ALJ's reasoning is misplaced. Therefore, the ALJ's second reason for providing little weight to
16 | Dr. Khaleeq's opinion is not specific and legitimate and supported by substantial evidence.

17 | Third, the ALJ discounted Dr. Khaleeq's opinion because it is inconsistent with
18 | Plaintiff's positive response to pain management and with Plaintiff's spinal disorders. AR 24. An
19 | ALJ need not accept an opinion which is inadequately supported "by the record as a whole." *See*
20 | *Batson v. Commissioner of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). However, a
21 | conclusory statement finding an opinion is inconsistent with the overall record is insufficient to
22 | reject the opinion. *See Embrey*, 849 F.2d 418 at 421-422. An ALJ merely offers her conclusion
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1 when her statement “stands alone, without any supporting facts...” *Hess v. Colvin*, No. 14–8103,
2 2016 WL 1170875, at *3 (C.D. Cal. Mar. 24, 2016). As the Ninth Circuit has stated:

3 To say that medical opinions are not supported by sufficient objective findings or
4 are contrary to the preponderant conclusions mandated by the objective findings
5 does not achieve the level of specificity our prior cases have required, even when
6 the objective factors are listed seriatim. The ALJ must do more than offer his
7 conclusions. He must set forth his own interpretations and explain why they, rather
8 than the doctors’, are correct.

9 *Embrey*, 849 F.2d at 421.

10 Here, the ALJ failed to explain how any of Dr. Khaleeq’s observations are inconsistent
11 with Plaintiff’s positive response to pain management or with his spinal disorders. *See Barnhart*,
12 331 F.3d 565 at 569. The ALJ merely states Dr. Khaleeq’s opinion is inconsistent with Plaintiff’s
13 positive response to pain management and provides no reasoning on how the opinion is
14 inconsistent. There exists the possibility that Plaintiff responded well to pain management, yet
15 still has significant limitations. *See Reddick*, 157 F.3d 715 at 722-23 (finding an ALJ must not
16 “cherry-pick” certain observations without considering their context). Further, the ALJ does not
17 describe what spinal disorders she is referring to, nor does she explain how Dr. Khaleeq’s
18 opinion is inconsistent with Plaintiff’s spinal disorders. These findings are, by definition,
19 conclusory. *See Hess*, No. 14–8103, 2016 WL 1170875, at *3. Thus, the ALJ’s third reason for
20 providing little weight to Dr. Khaleeq’s opinion is not specific and legitimate and supported by
21 substantial evidence.

22 For the above stated reasons, the Court concludes the ALJ failed to provide specific,
23 legitimate reasons supported by substantial evidence for assigning little weight to Dr.
24 Khaleeq’s opinion. Accordingly, the ALJ erred.

“[H]armless error principles apply in the Social Security context.” *Molina v. Astrue*,
674 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial

1 to the claimant or “inconsequential” to the ALJ’s “ultimate nondisability determination.” *Stout*
2 *v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674 F.3d at
3 1115. The determination as to whether an error is harmless requires a “case-specific
4 application of judgment” by the reviewing court, based on an examination of the record made
5 “‘without regard to errors’ that do not affect the parties’ ‘substantial rights.’” *Molina*, 674 F.3d
6 at 1118-1119 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

7 Had the ALJ given great weight to Dr. Khaleeq’s opinion, the ALJ may have included
8 additional limitations in the RFC. For example, Dr. Khaleeq opined Plaintiff would have
9 difficulty performing work activities and maintaining regular attendance due to his pain. AR
10 398. In contrast, in the RFC, the ALJ did not include any absenteeism or productivity
11 limitations. *See* AR 20. Therefore, if Dr. Khaleeq’s opinion was given great weight and
12 additional limitations were included in the RFC and in the hypothetical questions posed to the
13 vocational expert (“VE”), the ultimate disability determination may have changed.
14 Accordingly, the ALJ’s errors are not harmless and require reversal.

15 B. Mr. March

16 Mr. March, an Advanced Registered Nurse Practitioner, filled out two Washington
17 State Department of Social and Health Services (“DSHS”) forms following evaluations of
18 Plaintiff in November 2015 and November 2017. AR 399-408, 575-588. On both forms, Mr.
19 March checked the box indicating Plaintiff should be limited to sedentary work, which the
20 forms define as having the ability “to lift 10 pounds maximum and frequently lift or carry
21 lightweight articles ... [and to] walk or stand only for brief periods.” AR 401, 578. Mr. March
22 also opined Plaintiff would have significant interference with his ability to conduct basic work
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1 activities, including sitting, standing, walking, lifting, carrying, handling, pushing, pulling,
2 reaching, stooping, and crouching. AR 400, 577.

3 The ALJ gave little weight to Mr. March's opinions, saying:

4 (1) Mr. March did not explain why the claimant would be limited to the sedentary
5 exertional level. (2) His assessment is inconsistent with the objective evidence,
6 course of treatment, claimant's positive response to pain management, and the
7 claimant's activities of daily living, as discussion throughout this decision.

8 AR 24 (citations omitted) (numbering added).

9 First, the ALJ rejected Mr. March's opinions because he did not explain why Plaintiff
10 would be limited to sedentary work. AR 24. An ALJ may "permissibly reject[] ... check-off
11 reports that [do] not contain any explanation of the bases of their conclusions." *Molina*, 674
12 F.3d 1104 at 1111-1112 (quoting *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir.1996)). But,
13 "opinions in check-box form can be entitled to substantial weight when adequately supported."
14 *Neff v. Colvin*, 639 Fed. Appx. 459 (9th Cir. 2016) (internal quotation marks omitted) (citing
15 *Garrison v. Colvin*, 759 F.3d 995, 1013 (9th Cir. 2014)).

16 Here, Mr. March's opinions regarding Plaintiff's limitation to sedentary work was not
17 confined to a check-the-box form. Mr. March completed two DSHS forms. *See* AR 399-408,
18 575-588. While he opined to several limitations in "check-off" format, both of Mr. March's
19 opinions were based on clinical visits where Mr. March conducted a review of systems, a
20 review of past medical/surgical history, a physical exam, and made diagnoses. *See* AR 399-
21 408, 575-588. During the November 2015 exam, Mr. March found Plaintiff's cervical spine
22 was tender and that Plaintiff felt moderate pain with motion. AR 406. He also found Plaintiff's
23 shoulders were tender, that Plaintiff felt moderate pain with motion, and Plaintiff's right hip
24 was tender and caused pain with motion. AR 406. He diagnosed Plaintiff with cervical
25 radiculopathy, chronic pain syndrome, hip pain, and bilateral low back pain with sciatica. AR

1 407. During the review of systems, Mr. March observed Plaintiff had an irregular heartbeat
2 with palpitations. AR 405. He observed Plaintiff had extreme weakness and “numbness in
3 extremity.” During the November 2017 exam, Mr. March found Plaintiff’s cervical spine was
4 painful with motion. AR 583. He also found Plaintiff’s shoulders were painful with motion.
5 AR 583. During the review of systems, Mr. March noted back pain, joint pain, neck pain, and
6 arthritic manifestations. AR 582. Mr. March diagnosed Plaintiff with degenerative disc disease,
7 cervical radiculopathy, chronic bilateral low pain with bilateral sciatica, and lumbago with
8 sciatica on Plaintiff’s right side. AR 584. As Mr. March’s opinions included testing and results
9 relevant to the opined limitations, his opinions were not confined to a check-the-box form.
10 Thus, the ALJ’s finding that Mr. March did not provide an adequate explanation for his
11 opinion is not a germane reason for discounting the opinion. *See Smith v. Astrue*, 2012 WL
12 5511722, at *6 (W.D. Wash. Oct. 25, 2012) (holding an ALJ erred by rejecting an examining
13 physician’s opinion as a “check-off” report where the physician “conducted a clinical
14 interview, [and] report[ed] his findings and observations” in the report).

15 Next, the ALJ discounted Mr. March’s opinion because it is inconsistent with the
16 record. AR 24. As discussed above, a conclusory statement finding an opinion is inconsistent
17 with the overall record is insufficient to reject the opinion. *See Embrey*, 849 F.2d 418 at 421-422.
18 Here, the ALJ failed to explain how any of Mr. March’s observations are inconsistent with the
19 objective evidence, course of treatment, Plaintiff’s positive response to pain management, or
20 Plaintiff’s activities of daily living. *See Barnhart*, 331 F.3d 565 at 569. The ALJ merely states
21 Mr. March’s opinion is inconsistent with the record. Without further reasoning, the ALJ’s
22 finding is conclusory. *See Reddick*, 157 F.3d 715 at 722-23. Thus, the ALJ’s second reason for
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1 providing little weight to Mr. March's opinion is not germane. Accordingly, the ALJ erred by
2 improperly discounting Mr. March's opinions and must reconsider them on remand.

3 C. Ms. Davies

4 Ms. Davies, an Advanced Registered Nurse Practitioner, completed a DSHS evaluation
5 of Plaintiff in January 2015. AR 357-366. She reviewed Plaintiff's past medical/surgical history,
6 conducted a physical exam, and opined to limitations in check-the-box format. AR 363-365. Ms.
7 Davies noted "significant tenderness with light palpation along cervical, thorasic [sic] and
8 lumbar spine." AR 365. She diagnosed Plaintiff with lumbago, myalgia and myositis, shoulder
9 joint pain, and cervicgia. AR 365.

10 The ALJ provided Ms. Davies's opinion little weight for three reasons:

11 (1) Little explanation was given for her assessment. (2) Moreover, her assessment
12 seems inconsistent with the objective medical evidence, course of treatment,
13 claimant's positive response to pain management, and the claimant's activities of
daily living. (3) Additionally, a Washington State DSHS medical consultant
determined that this assessment was not supported by medical evidence.

14 AR 24 (citations omitted) (numbering added).

15 The first two reasons the ALJ provided for discounting Ms. Davies's opinion are identical
16 to the reasons the ALJ provided for discounting Mr. March's opinion, and both suffer similar
17 flaws. First, Ms. Davies's opinion was not confined to a check-the-box form. Ms. Davies
18 completed a DSHS form. *See* AR 357-366. While she opined to several limitations in "check-
19 off" format, Ms. Davies's opinions included a clinical visit where she conducted a review of
20 systems, a review of past medical/surgical history, a physical exam, took vitals, and made
21 diagnoses. *See* AR 357-366. As Ms. Davies's opinion included testing and results relevant to
22 the opined limitations, her opinion was not confined to a check-the-box form. Thus, the ALJ's
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1 finding that Ms. Davies did not provide an adequate explanation for her opinion is not a
2 germane reason for discounting the opinion. *See Smith*, 2012 WL 5511722, at *6.

3 Second, the ALJ discounted Ms. Davies's opinion because it was inconsistent with the
4 record. AR 24. Here, the ALJ failed to explain how any of Ms. Davies's observations are
5 inconsistent with the objective evidence, course of treatment, Plaintiff's positive response to pain
6 management, or Plaintiff's activities of daily living. *See Barnhart*, 331 F.3d 565 at 569. The ALJ
7 states Ms. Davies's opinion is inconsistent with the record and provides no further reasoning.
8 This is conclusory. *See Reddick*, 157 F.3d 715 at 722-23. Thus, the ALJ's second reason for
9 providing little weight to Ms. Davies's opinion is not germane.

10 Third, the ALJ discounted Ms. Davies's opinion because "a Washington State DSHS
11 medical consultant determined that this assessment was not supported by medical evidence." AR
12 24. When a medical opinion is contradicted, the ALJ may reject the opinion "for specific and
13 legitimate reasons that are supported by substantial evidence in the record." *Lester*, 81 F.3d at
14 830-831; *Murray*, 722 F.2d 499 at 502. The ALJ can accomplish this by "setting out a detailed
15 and thorough summary of the facts and conflicting clinical evidence, stating his interpretation
16 thereof, and making findings." *Reddick*, 157 F.3d 715 at 725. "Other medical source"
17 testimony "is competent evidence that an ALJ must take into account," unless the ALJ
18 "expressly determines to disregard such testimony and gives reasons germane to each witness
19 for doing so." *Lewis*, 236 F.3d 503 at 511; *Turner*, 613 F.3d 1217 at 1224.

20 Here, the ALJ simply noted Ms. Davies's opinion is contradicted by a DSHS medical
21 consultant. *See* AR 24. Citing a physician who reviewed the medical opinion evidence and
22 found the evidence unsupported does not release the ALJ of her duty to provide germane
23 reasons for discounting Ms. Davies's opinion. Doing so does not achieve the specificity
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1 required by the Ninth Circuit. *See Bruce*, 557 F.3d 1113 at 1115. Without further analysis, the
2 ALJ's finding is inadequately supported. Thus, the ALJ's second reason for discounting Ms.
3 Davies's opinion is not germane. Accordingly, the ALJ erred by improperly considering Ms.
4 Davies's opinion and must reconsider it on remand.

5 D. Dr. Landrum

6 Treating physician Dr. Landrum opined Plaintiff could lift ten pounds maximum, could
7 frequently lift/carry two pounds, and could sit for most of the day but would require a break
8 every twenty minutes to stand or walk for five minutes. AR 325. Dr. Landrum also opined
9 Plaintiff was limited to the sedentary exertional level and would need frequent position changes.
10 AR 333, 342, 350.

11 The ALJ discussed Dr. Landrum's opinions and gave them little weight because "these
12 opinions are inconsistent with the objective evidence, course of treatment, claimant's positive
13 response to pain management, and the claimant's activities of daily living..." AR 24. The ALJ
14 used the same reasons to discount the other medical opinions, discussed above. *See Section I.A-*
15 *C, supra*. Here, the ALJ again failed to explain how any of Dr. Landrum's observations are
16 inconsistent with the objective evidence, course of treatment, Plaintiff's positive response to pain
17 management, or Plaintiff's activities of daily living. *See Barnhart*, 331 F.3d 565 at 569. The ALJ
18 states Dr. Landrum's opinion is inconsistent with the record and provides no further reasoning.
19 Again, this is conclusory without further analysis. *See Reddick*, 157 F.3d 715 at 722-23. Thus, the
20 ALJ's reasons for providing little weight to Dr. Landrum's opinion are not specific and
21 legitimate and supported by substantial evidence. Accordingly, the ALJ erred and is directed to
22 reassess the following portions of Dr. Landrum's opinion on remand: (1) that Plaintiff can lift ten
23 pounds maximum, can frequently lift/carry two pounds, and can sit for most of the day but
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1 requires a break every twenty minutes to stand or walk for five minutes; and (2) that Plaintiff is
2 limited to the sedentary exertional level and needs frequent position changes.

3 **II. Whether the ALJ properly considered Plaintiff's subjective symptom**
4 **testimony.**

5 Plaintiff contends the ALJ failed to give clear and convincing reasons for rejecting
6 Plaintiff's testimony about his symptoms and limitations. Dkt. 15, pp. 5-8. The Court concludes
7 the ALJ committed harmful error in assessing the opinions of Dr. Khaleeq, Mr. March, and Ms.
8 Davies, and a portion of Dr. Landrum opinion, and must re-evaluate them on remand. *See*
9 Section I, *supra*. Because Plaintiff will be able to present new evidence and new testimony on
10 remand and because the ALJ's reconsideration of the medical evidence may impact her
11 assessment of Plaintiff's subjective testimony, the ALJ must reconsider Plaintiff's testimony on
12 remand.

13 **III. Whether the ALJ properly determined Plaintiff's RFC.**

14 Plaintiff asserts the ALJ erred in assessing his RFC and finding him not disabled at Step
15 5 of the sequential evaluation process because the RFC and hypothetical questions did not
16 contain all Plaintiff's functional limitations. Dkt. 15, pp. 2, 10. The Court concludes the ALJ
17 committed harmful error when she failed to properly consider the opinions of Dr. Khaleeq, Mr.
18 March, Ms. Davies, and a portion of Dr. Landrum's opinion, and is directed to re-evaluate these
19 opinions and Plaintiff's subjective symptom testimony on remand. *See* Sections I & II, *supra*.
20 The ALJ must therefore reassess the RFC on remand. *See* Social Security Ruling 96-8p ("The
21 RFC assessment must always consider and address medical source opinions."); *Valentine v.*
22 *Commissioner Social Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009) ("an RFC that fails to
23 take into account a claimant's limitations is defective"). As the ALJ must reassess Plaintiff's
24 RFC on remand, she must also re-evaluate the findings at Step 5 to determine if there are jobs

1 existing in significant numbers in the national economy Plaintiff can perform in light of the
2 RFC. *See Watson v. Astrue*, 2010 WL 4269545, *5 (C.D. Cal. Oct. 22, 2010) (finding the
3 ALJ's RFC determination and hypothetical questions posed to the VE defective when the ALJ
4 did not properly consider a doctor's findings).

5 **IV. Whether this case should be remanded for an award of benefits.**

6 Plaintiff argues this matter should be remanded with a direction to award benefits. *See*
7 Dkt. 15, pp. 2, 11. The Court may remand a case "either for additional evidence and findings
8 or to award benefits." *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when
9 the Court reverses an ALJ's decision, "the proper course, except in rare circumstances, is to
10 remand to the agency for additional investigation or explanation." *Benecke v. Barnhart*, 379
11 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit created a "test for
12 determining when evidence should be credited and an immediate award of benefits directed[.]"
13 *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000). Specifically, benefits should be
14 awarded where:

15 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
16 claimant's] evidence, (2) there are no outstanding issues that must be resolved
17 before a determination of disability can be made, and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled were such
evidence credited.

18 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir.
19 2002). The Court has determined, on remand, the ALJ must re-evaluate the opinions of Dr.
20 Khaleeq, Mr. March, and Ms. Davies, a portion of Dr. Landrum opinion, and Plaintiff's
21 testimony. Therefore, there are outstanding issues which must be resolved and remand for
22 further administrative proceedings is appropriate.

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Dated this 6th day of February, 2020.

David W. Christel
United States Magistrate Judge